

42 IAC 1-5-7 Conflicts of interest; contracts (IC 4-2-6-10.5)

IC 4-2-6-1 Definitions

IC 35-44-1-3 Conflict of interest

LEPC members were found to be special state appointees and were therefore required to make full written disclosure of and terminate or dispose of any financial interests in IDHS contracts.

May 11, 2006

No. 06-I-13

BACKGROUND

This request concerns Indiana Department of Homeland Security contracts with individuals who are or may be special state appointees.

None of the individuals that are the subject of this request directly participate in or have any official responsibility for any activities of the Indiana Department of Homeland Security. Each of the contractors entered into the contract as an individual and 100% of the contract amount has been or will be paid directly to each individual. Included with the request, are additional documents prepared by the contractors containing statements of financial interests in the contracts.

The Indiana Department of Homeland Security believes that each of the contracts could be performed without compromising the official duties of the special state appointees. Although the Indiana Department of Homeland Security does have employees that are qualified to teach the majority of the courses taught by these contract instructors, these employees would not be able to serve as instructors for all of the courses taught by these contract instructors and still perform their regular duties.

The Department of Homeland Security commits to the State Ethics Commission that it will ensure that all of the IC 4-2-6-10.5 exceptions will be met prior to awarding future contracts to individuals who are state officers, state employees, or special state appointees.

ISSUES

1. Are members of Local Emergency Planning Committees "special state appointees"?
2. If so, has the statutory criteria for an exception to Section 10.5 been satisfied in regard to the existing IDHS contracts with the five special state employees?

RELEVANT LAW

IC 4-2-6-1(16)

IC 4-2-6-10.5

IC 35-44-1-3

Conflict of interest

CONCLUSION

Clearly, the members of the Indiana Emergency Response Commission (IERC) and the Board of Firefighting Personnel Standards and Education are "special state appointees." Both commissions are created by statute; the members are appointed by the Governor.

The concern in this request is the nature of the Local Emergency Planning Committee (LEPC). This entity is mandated by Federal law. The law requires the IERC to establish the LEPC and to appoint its members. Under Indiana law, the LEPC is required to submit a roster of the current

membership to the IERC at least once a year. The IERC takes action on the roster after it is submitted. In a 1994 OAG unofficial opinion, the OAG opined that the authority to appoint and revise the appointments to the LEPCs remains solely within the IERC (whose members are appointed by the Governor). In an earlier opinion (1988) the OAG concluded that LEPCs are state entities and that local government units do not have any authority to regulate LEPC activities. In 1998, in another OAG opinion, the OAG determined that an LEPC is an entity sufficiently controlled and funded by the state and could be represented by the OAG.

Thus, every opinion rendered to date on the subject indicates that the members of the LEPC are "special state appointees." Each of the five persons of interest in this opinion is a member of a LEPC. Accordingly, they are "special state appointees" who are subject to the application of IC 4-2-6-10.5 when contracting with any state agency. They are also subject to IC 35-44-1-3 because their contracts with IDHS are contracts with the agency they serve. For purposes of establishing the date on which the LEPC members learned that they are special state appointees, the Commission determines that date to be the date this Official Advisory Opinion is rendered, May 11, 2006.

Pursuant to IC 4-2-6-10.5, a special state appointee may not knowingly have a financial interest in a contract made by an agency unless the criteria of the statutory exception are met. It is important to note the effective date Section 10.5 and its precedent law, Executive Order 05-12. Section 10.5 became effective on May 11, 2005. However, the statute's origin is contained in Executive Order 05-12 (6), effective January 10, 2005.

Thus, the effective date for the application of the new law is January 10, 2005. The new law does not apply to contracts that were executed prior to January 10, 2005. Prior to that date, the applicable law was IC 4-2-6-9 and IC 35-44-1-3.

The general prohibition against a state officer, employee or special state appointee contracting with a state agency does not apply to a state officer, employee or a special state appointee who does not participate in or have official responsibility for any of the activities of the contracting agency if:

- A. The contract is made after public notice or, where applicable, through competitive bidding. As to the contracts that were executed prior to January 10, 2005, this criterion is not applicable. The Department of Homeland Security acknowledges that any future contracts with state officers, employees or special state appointees will be competitively bid.
- B. The state officer, employee or special state appointee files with the commission a statement of all related financial interests in the contract. Again, it is important to note that contracts which were executed prior to January 10, 2005 were not subject to this requirement. However, the conflict of interest filing is a criterion that exempts a public servant from violation of IC 35-44-1-3.
- C. The contract can be performed without compromising the performance of the official duties and responsibilities of the state officer, employee or special state appointee. The IDHS states that each of the contracts can be performed without compromising the official duties of the special state appointees.
- D. In the case of a contract for professional services, the appointing authority of the contracting agency makes and files a written certification with the commission that no other state officer, employee, or special state appointee of that agency is available to perform those services as part of the regular duties of the state officer, employee, or special state appointee. This section is not applicable. The services of the special state appointee contractors are not "professional services" as defined in IC 23-1.5-1-11.

Any IDHS contract executed after January 9, 2005 in which a state officer, employee or special state appointee has a financial interest must comply with IC 4-2-6-10.5. Since the LEPC members, who were contracting in good faith, did not know that they were special state appointees until May 11, 2006, such LEPC members have thirty (30) days from May 11, 2006 to comply with IC 4-2-6-10.5 (b) (2). This sub-section requires the special state appointees to make a full written disclosure of any financial interests in their IDHS contracts to both the IDHS and the State Ethics Commission and terminate or dispose of their financial interests in contracts that violate IC 4-2-6-10.5.